

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JANNET ORMEROD
Claimant

VS.

ALBERTSON'S, INC.
Respondent
Self-Insured

)
)
)
)
)
)
)

Docket No. 258,035

ORDER

Respondent appealed Administrative Law Judge Nelsonna Potts Barnes' August 22, 2000 preliminary hearing Order.

ISSUES

The Administrative Law Judge found claimant proved she injured her low back at work on July 3, 2000. Also, the Administrative Law Judge found claimant provided respondent with timely notice of accident within 10 days.¹ Respondent was ordered to provide claimant with medical treatment and if taken off work, temporary total disability benefits.

On appeal, respondent contends claimant failed to prove her low-back injury occurred while employed by the respondent. Additionally, respondent argues that claimant failed to provide respondent with the required timely notice of accident.

In contrast, claimant requests the Appeals Board to affirm the Administrative Law Judge's preliminary hearing Order. Claimant argues the preliminary hearing record proves her low back was injured while working for the respondent on July 3, 2000. Furthermore, claimant contends she provided respondent with timely notice of the accident.

¹See K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the parties' briefs, the Appeals Board finds the preliminary hearing Order should be affirmed.

Claimant contends she injured her low back at work while unloading a pallet of grocery items on July 3, 2000. Claimant notified her immediate supervisor, Gordon Carnes, that she had injured her low back unloading the pallet. Because of those complaints, Mr. Carnes finished unloading the grocery items from the pallet for claimant.

Claimant returned to work the next day, July 4, 2000, Independence Day. She worked from 1:00 p.m. to 10:00 p.m. that day. Claimant testified she also told the assistant store manager, Scott Breezy, on July 4, 2000, that she injured her back the day before unloading a pallet.

Claimant then had a day off on July 5, 2000. Because her low back continued to be symptomatic, claimant went on her own for medical treatment to Wesley Medical Center Emergency Department. She was examined by Imad A. Fakhani, M.D. The emergency department medical record, admitted into evidence, indicates claimant gave a history of injuring her low back two days before while unloading a truck at work. She had complaints of low-back pain, ambulated slowly, and appeared uncomfortable. The emergency physician prescribed rest, medication, and to follow up with her family physician as needed. Claimant was released to return to work on July 7, 2000.

Because of her continuing low-back pain, on July 11, 2000, claimant saw family physician Stan A. Messner, M.D. Dr. Messner took claimant off work and had her undergo an MRI examination. The MRI examination diagnosed claimant with a herniated disc with a small fragment at L4-5. Additionally, the MRI examination found a previous surgery site at L5-S1 with central and eccentric bulging of the disc at the L5-S1 location.

Claimant was then referred by Dr. Messner to neurosurgeon Paul S. Stein, M.D. Dr. Stein saw claimant on July 23, 2000. After taking a history from the claimant, reviewing the MRI examination report, and performing a physical examination of claimant, Dr. Stein's impression was right L5 radiculopathy secondary to a L4-L5 disc herniation. He took claimant off work, prescribed an epidural steroid injection, and prescribed anti-inflammatory medication. Dr. Stein also concluded, "if she does not improve adequately then we would consider the possibility of surgical intervention."

At the preliminary hearing held on August 22, 2000, claimant's low back remained symptomatic, and she continued on pain medication. Claimant testified she had undergone two weeks of physical therapy without relief. But the epidural injection had provided her with some relief that allowed her to tolerate sitting for a minimum period of time.

Todd W. Rush, the director of the store where claimant was employed, also testified before the Administrative Law Judge at the preliminary hearing. Mr. Rush claims he did not have any knowledge that claimant was making a claim for a work-related back injury until July 25, 2000, when claimant brought an off-work slip from Dr. Stein.

Mr. Rush testified the first time he received an off-work slip from claimant was on July 14, 2000. After he received the off-work slip, he investigated as to whether or not claimant was taken off work because she had a work related injury. Mr. Rush acknowledged that his assistant manager, Scott Breezy, had notified him that claimant had told Mr. Breezy that she had injured her back. But Mr. Rush testified that claimant had not notified Mr. Breezy that her back problem was work related.

Mr. Rush further testified he telephoned claimant at her home on July 14, 2000, and inquired of claimant of whether or not she had injured her back at work. Mr. Rush testified claimant told him that she had injured her back at work on July 8, 2000, and not on July 3, 2000, as she now claims. Mr. Rush also testified claimant then, during the telephone conversation, finally notified him, "it didn't happen at work."

Additionally, Mr. Rush testified when he investigated claimant's work-related injury on July 14, 2000, he did not inquire of claimant's immediate supervisor, Gordon Carnes, if claimant had notified him of a work-related back injury.

Claimant acknowledges Mr. Rush did telephone her on July 14, 2000, and questioned her about her low-back injury. Before the telephone conversation, however, claimant had just returned from a doctor's appointment where she had received a Demerol injection for pain. This injection made her disorientated. She testified that when Mr. Rush asked her when she injured her back at work, she told Mr. Rush it was around July 8, 2000. Claimant testified the reason she related the accident occurring around July 8, 2000, was because she recalled the accident occurred sometime around her daughter's birthday of July 8, 2000. Claimant also testified Mr. Rush was yelling at her during the telephone conversation because he was upset that his store would be fined by the corporate office the sum of \$3,000.00 for not reporting the work-related accident within 24 hours. This upset claimant, and she then told Mr. Rush maybe it did not happen at work.

The Appeals Board finds claimant's testimony and the contemporaneous medical report from Wesley Medical Center Emergency Department prove claimant injured her low back at work on July 3, 2000.

The Appeals Board further finds claimant proved she provided respondent with timely notice of the work-related accident that occurred on July 3, 2000. The Appeals Board also finds this conclusion is supported by claimant's testimony. Furthermore, the Appeals Board finds Mr. Rush's testimony proves he personally knew claimant was claiming a work-related accident at least as early as July 14, 2000. And when Saturdays, Sundays, and holidays are not counted in computing the statutory 10-day notice

requirement, claimant provided respondent with the required 10-day notice of the July 3, 2000, accident as of July 14, 2000.²

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Nelsonna Potts Barnes' August 22, 2000, preliminary hearing Order should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of November 2000.

BOARD MEMBER

c: Gerard C. Scott, Wichita, KS
Frederick L. Haag, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director

²See Bain v. Cormack Enterprises, Inc., 267 Kan. 754, 758 and 759, 986 P.2d 373 (1999).